78-1526

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term, 1978

No. 78-

Keith A. Abel, et al. ..... *Petitioners*

V.

United States ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of

Claims, entered in the above-entitled case on January 5, 1979. [1]

OPINION BELOW

The opinion of the United States Court of Claims is unreported and is printed in Appendix A hereto.

JURISDICTION

The Judgment of the United States Court of Claims was entered on January 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255 (1).

QUESTIONS PRESENTED

1. Whether the ultimate finding of the Court below that Petitioners were employees of the United States (U.S. Army) by "appointment" under statute and not entitled to breach of employment agreement

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1. In addition to Petitioner Keith A. Abel, the following named persons are Petitioners herein: Thomas Edward Bower, Harry S. Broaddus, Howard E. Burnette, Jr., Stephen E. Burnette, Leonard J. Deney, III, Charles David Douthat, Boyce L. Estes, Jr., Terry H. Fogle, Max W. Garwood, James Ronald Goodin, James E. Gortemoller, Charles F. Grant, Randall L. Gutscher, David W. Hager, James H. Hensley, James G. Janson, Jeffrey P. Keehn, James W. Knoch, Hayes B. Lee, John T. Longbottom, Michael V. Lupo, Clifford J. Massey, Thomas F. Massey, Mark E. McAuliffe, James A. Ownby, Mark A. Peterson, John M. Reiss, Antonio D. Saenz, George T. Skipper, Frederick J. Wells, Jr., and Richard S. Wexler.

claims is sustained by the undisputed facts and the applicable law, or whether Petitioners were employees by contract for purposes of the graduate level education promises made by the United States and entitled to their common law breach of contract remedies.

2. Whether the ultimate finding of the Court below that Petitioners did not have a right to university training is sustained by the undisputed facts.

STATEMENT

During the year 1975 each of the Petitioners and many others similarly situated entered into written employment agreements with the U.S. Army Materiel Development and Readiness Command, an agency of the United States Government. These written employment agreements referred to and were conditioned upon certain ancillary documents, pamphlets, and correspondence pertaining to the engineering graduate program at the Army Materiel Command's Intern Training Center, Texarkana, Texas. These materials were prepared by the Army for the review of prospective applicants for the program and to be used by them in determining whether or not they wanted to make an application for the program. Among the provisions of the agreements and the ancillary documents was a promise on the Army's part to provide the successful applicants with a period of graduate level educational training under a contract with Texas A & M University that would, upon successful completion of the two-year training program, guarantee the applicant a Master's Degree in Industrial Engineering from that university.

Much publicity was given to this program on various college and university campuses throughout the nation in an effort to attract the attention of prospective applicants who just had or soon would graduate from college with baccalaureate degrees in engineering.

Petitioners, all of whom were found to be qualified for the program and accepted the terms of the employment, executed Employee Continued Service Agreements wherein they agreed, in addition to the terms of their written employment agreements, to continue in the service of the Department of the Army or another component of the Department of Defense for a period of three years after completion of their graduate education program.

On March 16, 1976, the Army notified Petitioners that it would not continue the graduate education phase of the program beyond May 15, 1976 due to a cutback in Congressional funding for the program. Since the promise of graduate level educational opportunities, with pay, was the primary inducement for Petitioners to execute the previously mentioned agreements, they sought administrative relief for what they perceived to be a breach of their employment agreements. They timely filed claims with the Department of the Army and appealed the Army's denial of those claims to the Comptroller General of The United States. The Comptroller General denied claims presented to him on August 26, 1977. A Petition was then filed in the United States Court of Claims under the Tucker Act, 28 U.S.C., Section 1491, the same authorizing claims founded on breaches of express and implied contracts with the United States to be pursued there.

The facts alleged by Petitioners were not disputed by the Government. The United States filed a

Motion for Summary Judgment as its first pleading and Petitioners filed an Opposition and Cross-Motion for Summary Judgment in response thereto. These matters were orally argued to the United States Court of Claims on December 1, 1978 and the Court's judgment was entered on January 5, 1979, finding that Petitioners were not contractual employees of the United States and, even if they were, the termination of the graduate level portion of the program was not such a qualitative change in the program as to constitute a breach of the employment agreements. From this Judgment comes this Petition for review.

REASONS FOR GRANTING THE WRIT

1. Clearly, the questions presented for review are of importance to the Petitioners. Moreover, they are of general import to that vast number of persons who are in the employ of the National Government and those who will be recruited for such employment in the future. There is no question but that the Federal Government is our nation's largest employer. And, it has been and is becoming increasingly competitive in its recruitment of technical and professional manpower both for military and non-military service. It was in such technical manpower recruitment that Petitioners were promised the benefits by the Government which were not received and the breach of which agreements the Court below determined to be without remedy.

2. Further, the Court below construed one of this Court's decisions to be authority for the proposition that Petitioners' rights are not contractual in nature but are statutorily controlled. *See United States v. Larionoff*, 431 U.S. 864 (1977). Actually, *Larionoff* supports Petitioners' contentions below that the university phase of the career intern program, as an inducement authorized by Congress and implemented by Army regulations, not "pay and allowances", may be contractually enforced against the United States even though the enabling statute or other Congressional authority is repealed. And, since the training prescribed was not forthcoming the United States was liable in contract. In addition, it is

difficult if not impossible to legally differentiate between enlistment in the military service and employment by agreement with a military department. Certainly enlistment gives rise to contract. *United States v. Grimley*, 137 U.S. 147 (1890); *Bell v. United States*, 366 U.S. 393 (1961). Why then doesn't employment by written agreement do the same.

The apparent deviation of the Court below from binding precedents is a compelling reason for this Court to review here.

3. Finally, if for no other reason, this Court should grant the writ because the decision below is wrong and should be corrected before it becomes a bad precedent in an already uncertain body of jurisprudence pertaining to employment agreements with the Government.

The record is clear that Petitioners were promised the opportunity to obtain graduate level education in the subject program. Army instructors were substituted when funding cutbacks caused termination of the university phase of the program. This was a material breach of the agreements with Petitioners and cannot be excused under the rationales offered by the United States.

CONCLUSION

The facts of the instant case provide an excellent vehicle for this Court to define the legal relationships that arise between the United States and its employees who have been made written promises as to what they might expect in the way of benefits from their Government employment only to have these inducements to employment withdrawn, for one reason or another, once the employee/employer relationship has been consummated. The continuing need for highly trained technical and professional people in the Government service and the Government's apparent lack of interest in resolving these problems through the legislative process calls for a judicial resolution of the ambiguities that permeate this relationship at this time.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

G. WILLIAM LAVENDER
507 Hickory Street
Texarkana, Arkansas 75501

Counsel for Petitioners

IN THE UNITED STATES
COURT OF CLAIMS
JANUARY 5, 1979

NO. 39-78

KEITH A. ABEL, et al.	)	Whether the agreements
	)	signed by participants in a
v.	)	DARCOM training program
	)	were binding contracts; if so
THE UNITED STATES	)	whether the Government
	)	breached the contracts when
	)	it made a qualitative change
	)	in the training programs
	)	after an appropriations cut.

G. William Lavender, attorney of record, for plaintiff.

Daniella Sapriel, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant. *Peter A. T. Sartin*, of counsel.

Before NICHOLS, *Judge*, Presiding, KASHIWA and SMITH, *Judges*.

ORDER

This civilian pay case is before the court on defendant's motion and plaintiff's cross motion for summary judgment. There are no material facts in dispute and, after carefully reviewing the briefs, exhibits, and oral arguments presented, we grant judgment for defendant.

The present dispute arose out of a qualitative change made in May 1976 in a United States Army Development and Readiness Command (DARCOM) training program for engineers. The plaintiffs had all signed agreements and entered into training under the program in 1975. When the plaintiffs entered the program in 1975, it consisted of a two-year training program which culminated in the receipt of an advanced engineering degree followed by a three-year employment commitment by participants to the agency involved. The training period consisted of two 1-year segments. The first year of training was largely conducted by Army instructors. During the second year training was conducted under contractor instructors from Texas A & M University and upon successful completion of the second year participants were awarded a Master in Engineering degree from Texas A & M University.

When plaintiffs were approximately half way through the training program, Congress determined that contractor-instructed programs such as the one plaintiffs were participating in were no longer necessary

and eliminated funding for such programs from subsequent defense appropriations. As a result of the funding termination, DARCOM eliminated the Texas A & M instructors from its engineers training program, substituting in their place Army instructors. Of course, the change in instructors also resulted in the elimination of the right of successful participants in the training program to receive an advanced degree from Texas A & M University. DARCOM, recognizing that this major qualitative change in the engineers training program would cause dissatisfaction among current participants in the program, simultaneously offered current participants two options in addition to staying in the reconstituted training program: (1) participants could take a leave of absence so they could complete their advanced training at a recognized degree-awarding institution and then return to DARCOM or (2) participants could drop out of the program completely.

Plaintiffs contend that the agreements which they signed when they originally entered into DARCOM's training program constituted binding contracts between themselves and the United States. They argue the primary consideration and inducement flowing to them under the agreements was the promise of an advanced education culminating in the receipt of an advanced engineering degree from a recognized degree-awarding institution. In return they agreed to work for DARCOM for three years following the completion of the advanced training. When DARCOM terminated the advanced degree portion of the training program, plaintiffs contend DARCOM materially breached the agreements, damaging each of them in an amount exceeding $5,000.

Defendant contends that the agreements were not binding contracts of the United States and, further, that the pay and allowances of a federal employee are fixed by statute and not by contract. Alternatively, assuming *arguendo* that the agreements are contracts, defendant maintains the qualitative change made in the DARCOM training program in May 1976 was not a material breach of the contracts.

The general rule is, as defendant states, that the pay and allowances of a federal employee are statutory and not contractual. *See United States v. Larionoff*, 431 U. S. 864 (1977). This court has steadfastly followed this rule on numerous occasions. *See Urbina v. United States*, 192 Ct. Cl. 875, 428 F.2d 1280 (1970); *Hayman v. United States*, Ct. Cl. No. 432-77 (order dated November 22, 1978). Accordingly, we reject plaintiffs' contention that the pay and allowances (educational benefits) of these plaintiffs were fixed by contract rather than under the statutory provisions, 5 U.S.C. §4101 *et seq.* (1976), under which this type of training program is authorized and which make no provision for any right of the kind here asserted.

Assuming *arguendo* that the agreements involved herein are contracts, they did not by their own terms create a contract right to university training. Each one contained the following provisions:

> It is understood that I will *be provided such training*, rotational assignments, and schooling *as the Army Material Command may determine is necessary for my development in my career field.*

> I recognize that the Army Material Command may terminate this agreement at any time, by issuing a notice to that effect, *for such reasons as changes in program requirements*, inadequate performance, or misconduct on my part. * * * [Emphasis supplied.]

Under these provisions DARCOM retained the right to change or terminate the training program entirely in accordance with the needs of the agency. Here DARCOM made a qualitative change in the program due to a cut in funding. Further, nothing appears in the written agreement that the plaintiffs signed which stated they would receive college credit for the training they would undergo under the program or that, upon successful completion of the training, they would receive an advanced degree in engineering from a recognized degree-granting institution. Plaintiffs urge that a change due to a cut in appropriated funding is not the same thing as a change in requirements; that DARCOM felt the training was needed. We think, in Government parlance, a cut in funding is to all intents the same as a cut in requirements; an unfunded want is not a requirement.

For the foregoing reasons, the court grants defendant's motion for summary judgment, denies plaintiffs' cross motion for summary judgment, and orders the petition dismissed.

BY THE COURT

/s/ Philip Nichols, Jr.
Philip Nichols, Jr.
Judge, Presiding

JANUARY 5, 1979

Supreme Court, U.S.
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JUN 26 1979
MICHAEL RODAK, JR., CLERK

No. 78-1526

In the Supreme Court of the United States

OCTOBER TERM, 1978

KEITH A. ABEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1526

KEITH A. ABEL, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they are entitled to damages for a breach of contract that allegedly occurred when the United States Army Development and Readiness Command (DARCOM) changed the features of a civilian engineer training program in which petitioners were participants.

1. In 1957, in order to eliminate a perceived shortage of engineers in certain fields, the Army Materiel Command, now DARCOM, established a five-year training and employment program for persons who had earned an undergraduate engineering degree. The first two years of the program involved advanced engineering education. The first year of instruction was provided by Army personnel. During the second year participants were enrolled in a graduate level engineering program at Texas

A&M University. On successful completion of this portion of the program, participants received master's degrees in engineering from Texas A&M. They were then committed to work for three years as civilian employees of DARCOM. The statutory authority for DARCOM's use of non-government facilities in the training of its employees was provided by 5 U.S.C. 4105 and 4108 and the predecessors of those sections.

Petitioners applied for admission to DARCOM's program, were accepted, and began their training in 1975, after signing a document entitled "Employment and Mobility Agreement for AMC [*i.e.*, Army Materiel Command] Interns." In the same year, the House Appropriations Committee reviewed DARCOM's program and concluded that the shortage of engineers no longer existed and that the provision of advanced engineering training at government expense was not necessary to ensure an adequate supply of engineers for the Army's needs. See H.R. Rep. No. 94-517, 94th Cong., 1st Sess. 63 (1975). Accordingly, Congress cut the funds for the DARCOM program from Defense Department appropriations.

As a consequence, DARCOM was unable to cover the university expenses associated with its program. DARCOM altered the program to provide instruction by Army personnel in both training years and thereby eliminated the opportunity for participants to obtain master's degrees from Texas A&M. Persons already in the program who did not wish to continue under the changed format were permitted either to take a leave of absence to complete their graduate training or to terminate their commitment altogether. Dissatisfied with the available options, petitioners brought this suit in the United States Court of

Claims. They asserted that DARCOM breached its contract with them and that they are entitled to damages as a result.

On cross motions for summary judgment, the Court of Claims held that "the pay and allowances of a federal employee are statutory and not contractual" and that "the statutory provisions * * * under which this type of training program is authorized * * * make no provision for any right of the kind here asserted" (Pet. App. 13). Alternatively, the court assumed that the employment agreement signed by petitioners was an enforceable contract; the court then held that the agreement does not obligate the Army to provide university training or an advanced degree (Pet. App. 13-14). The agreement states (*ibid.*; emphasis supplied by the court):

> It is understood that I will *be provided such training,* rotational assignments, and schooling *as the Army Material Command may determine is necessary for my development in my career field.*
>
> I recognize that the Army Material Command may terminate this agreement at any time, by issuing a notice to that effect, *for such reasons as changes in program requirements,* inadequate performance, or misconduct on my part.

These provisions, the court held, permitted DARCOM to alter the training program without incurring any obligation to the participants.

2. The Court of Claims correctly held that petitioners have no enforceable right to the university phase of the training program. The relevant statute, 5 U.S.C. 4105, does not create a right to obtain education or training from a private contractor. Rather, the statute merely authorizes federal agencies to contract for the use of non-

government facilities in training federal employees. When Congress decided that the use of such a contract for the training of Army engineers was economically inefficient, DARCOM was free to terminate its relationship with Texas A&M without violating any of petitioners' statutory or contractual rights.

The agreement signed by petitioners did not confer any right to a university education or degree. On the contrary, DARCOM reserved the right to change or cancel the training program based on Army needs or requirements. As events transpired, DARCOM was forced to change its program by reason of Congress' appropriations action. Under these circumstances, DARCOM did not breach any contractual agreement when it terminated its relationship with Texas A&M.

Petitioners' reliance on *United States* v. *Larionoff*, 431 U.S. 864 (1977), is unwarranted. That case involved the question whether the Navy could reclassify certain occupational specialties and thereby deprive certain enlistees of the reenlistment bonus they expected when they agreed to serve an additional term. This Court held that the Navy regulations permitting such a practice were inconsistent with the congressional intention to create a definite reenlistment bonus capable of determination at the time of reenlistment. No such statutory entitlement is involved here, and indeed, by cutting the appropriations for the DARCOM program, Congress explicitly indicated that it did not expect government-financed university training for Army engineers to continue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979